

The Executive Director respectfully recommends that the term "original" be replaced by the terms "preliminary report and" to provide clarification.

Finding of Fact No. 12

The Executive Director respectfully recommends that the date of "October 15, 2010" and the word "and" be deleted because a third amended petition was not filed. The Executive Director filed a preliminary and two amended petitions in this action.

Finding of Fact No. 14

The Executive Director respectfully recommends that the spelling of the name of an attorney representing the Executive Director in Finding of Fact No. 14 be changed from "James Salans" to "James Sallans", to reflect the correct spelling.

Finding of Fact No. 19

The ED respectfully recommends that the title "a Department of Public Safety pilot" in Finding of Fact No. 19 be changed to "the TCEQ Employee that conducted the investigation", to reflect the correct name of the witness.

Conclusion of Law Nos. 24, 25, 26

The ED respectfully requests that these three conclusions of law be deleted. The cases cited in these conclusions of law regard cost recovery actions and not enforcement actions.

Conclusion of Law No. 28

The ED respectfully recommends that the paraphrased portions of TEX. WATER CODE § 7.053 in Finding of Fact No. 28, "The law governing administrative penalties requires the TCEQ to take into account the history and actions of individual Respondents, including: (1) whether the violation could have been reasonably anticipated and avoided, (2) whether anyone gained any economic benefit by the

violation, and (3) any other matters that justice may require." be replaced by the entire and exact language of TEX. WATER CODE § 7.053 and read as follows:

"The law governing administrative penalties requires the TCEQ to take into account:

(1) the nature circumstances, extent duration, and gravity of the prohibited act with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health and safety of the public; (2) the impact of the violation on: (A) air quality in the region; (B) a receiving stream or underground water reservoir; (C) in stream uses, water quality aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or (D) affected persons; (3) with respect to the alleged violator: (A) the history and extent of previous violations; (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided; (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons; (D) economic benefit gained through the violation; and (E) the amount necessary to deter future violations; and (4) any other matters that justice may require." TEX. WATER CODE § 7.053.

In assessing administrative penalties, all the factors of TEX. WATER CODE § 7.053 shall be considered and applied together. Considering all the factors under this Section together ensures consistent application of assessed penalties and deters continuing and future violations. In addition, the Executive Director believes this would reduce actual and potential impact on the public health and the environment.

All Respondents are heirs of G.W. Carter and have an ownership interest in the contaminated property. Accordingly, in this enforcement action, the applicable administrative penalties and corrective actions should be assessed against all Respondents.

Conclusion of Law 29

The Executive Director respectfully recommends revisions to Conclusion of Law No. 29 by deleting the terms "Because Respondents", the term "and", and the terms, "were aware of the Property and of the economic benefits that they were deriving from the Property, the administrative penalty should be imposed on these persons." These revisions are requested to conform the Proposed Order with the Executive Director's revisions. The ED respectfully requests that the ALJ reconsider only assessing a penalty against a portion of the Respondents responsible for the violation.

Conclusion of Law 30

The Executive Director respectfully recommends revisions to Conclusion of Law No. 30 combining it with Conclusion of Law No. 29, and removing the terms "Justice would not be served by imposing on these Respondents an obligation to share in the payment of an administrative penalty:", and adding to the following terms, "are the Respondents in this action."

Conclusion of Law No. 31

The Executive Director respectfully recommends revisions to Conclusion of Law 31 by renumbering it to Conclusion of Law No. "30", removing the terms "these Respondents" and removing the names "Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox and Nokomis Hill.

These revisions are requested to conform the Proposed Order with the Executive Directors

to Revisions.

Ordering Provision No. 1

The Executive Director respectfully recommends removing the following names from Ordering Provision No. 1 to conform the Proposed Order with the Executive Director's revisions: Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill".

Ordering Provision No. 2

The Executive Director respectfully recommends replacing the language of Ordering Provision No. 2 with the following: "Immediately upon the effective date of this Order, cease accepting any additional municipal solid waste at the facility." In addition, the existing language of Ordering Provision No. 2, "Within 180 days, of the effective date of this Order, unless extended, Respondents, shall remove and dispose of all scrap tires on the Property at an authorized facility."

Ordering Provision No. 4

Please add that a copy of the certifications are to be sent to the Waste Section Manager as stated in the ED's revised proposed order.

Prayer

For these reasons, the ED respectfully requests the ALJ consider the ED's exceptions above. A copy of the Proposed Order with the recommended modifications is attached.

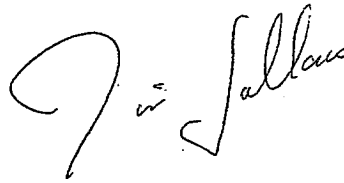
Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen Decker, Division Director
Litigation Division

A handwritten signature in black ink, appearing to read "Jim Sallans", is written over a horizontal line.

by

Jim Sallans
State Bar of Texas No. 00785413
Jennifer Cook
State Bar of Texas No. 00789233
Litigation Division, MC 175
P. O. Box 13087
Austin, Texas 78711-3087
(512) 239-1873
(512) 239-3434 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2011, the foregoing document was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day true and correct copies of the foregoing document were served to the following persons by the method of service indicated:

The Honorable Paul Keeper
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

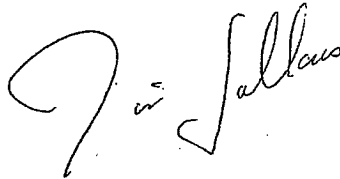
Facsimile

Mr. Darwin McKee
Attorney at Law
7901 Cameron Road
Building 3, Suite 340
Austin, Texas 78754
(512) 637-1477 (Fax)
Attorney for Respondents

Facsimile

Office of the Public Interest Counsel
Texas Commission on Environmental Quality
Mail Code 103

Via Electronic Delivery

A handwritten signature in black ink, appearing to read "Jim Sallans", is written above a horizontal line.

Jim Sallans

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND ORDERING
CORRECTIVE ACTION BY DIANE HILL, JAMES W. CARTER, JOE CARTER,
GETRELL A. CARTER, GERALD E. CARTER, LEE OTIS CARTER, GRADY
GOODLEY, COLINE KNOX, AND NOKOMIS HILL, DONALD A. HILL, DEBORAH
HILL-THOMPSON, LAWRENCE A. HILL, CANDIS A. HILL MCKELVY, KERMIT A.
HILL, DORRIS JEAN HILL, AURELIA HARRIS, DELMARIS ROBY, LAWADA
HILL, KEVIN HILL, CORA TURNER HOUSTON, JOE I. ROLAND, MERILEE
CRAWFORD, AND GAYNELL CARTER-JENKINS**

**TCEQ DOCKET NO. 2006-1140-MSW-E
SOAH DOCKET NO. 582-09-2078**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Second Amended Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Respondents Diane Hill, Doray Hill, Donald A. Hill, Deborah Hill-Thompson, Lawrence A. Hill, Candis A. Hill McKelvy, Kermit A. Hill, Dorris Jean Hill, Aurelia Harris, Grady Goodley, Delmaris Roby, Lawada Hill, Kevin Hill, Nokomis Hill, Cora Turner Houston, Coline Knox, James W. Carter, Lee Otis Carter, Joe I. Roland, Gettrell A. Carter, Gerald E. Carter, Katherine W. Carter, Merilee Crawford, Gaynell Carter-Jenkins, and Joe Carter. A Proposal for Decision (PFD) was presented by Paul D. Keeper, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Petition on October 20, 2010, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. In 1913, G.W. Carter purchased 89.5 acres in Caldwell County located near the present-day intersection of FM 672 and CR 169 (the Property).
2. In 1949, Mr. Carter died intestate in Texas, leaving 23 children as heirs.
3. For the next sixty years, ownership of the Property passed among the generations of the Carter family living in Alabama, Arizona, California, Minnesota, Mississippi, Oregon, and Texas.
4. On July 14, 2005, and July 18, 2006, the ED's investigators conducted compliance investigations of the Property.
5. The ED's investigators documented that thousands of scrap and used tires had been dumped on the Property.
6. On August 16, 2005, and July 18, 2006, the ED's investigators sent notices of violation to Respondents Diane and Doray Hill.
7. On January 15, 2009, the ED referred the case to SOAH.
8. In his preliminary report and petition, the ED: (1) alleged that Respondents had violated TEX. HEALTH & SAFETY CODE § 361.112(a) and 30 TEX. ADMIN. CODE (TAC) § 330.15(a) by storing more than 500 scrap or used tires on the Property without a registering the site as a tire storage facility, and (2) sought an order from the TCEQ that Respondents pay an administrative penalty for the violations and bring the Property into

compliance with Texas' environmental laws governing the storage of scrap and used tires.

9. Diane Hill, a great-granddaughter of G.W. Carter, gave the ED's investigators a list of Carter family members.
10. On May 19, 2009, the ED filed an amended petition, adding as Respondents Donald A. Hill, Deborah Hill-Thompson, Lawrence A. Hill, Candis A. Hill McKelvy, Kermit A. Hill, Dorris Jean Hill, Aurelia Harris, Grady Goodley, Delmaris Roby, Lawada Hill, Kevin Hill, Nokomis Hill, Cora Turner Houston, Coline Knox, James W. Carter, Lee Otis Carter, Joe I. Roland, Gettrel A. Carter, Gerald E. Carter, Katherine W. Carter, Merilee Crawford, Gaynell Carter-Jenkins, and Joe Carter, and sent the amended petition to Respondents.
11. Respondent Diane Hill had no role in the dumping or allowing the dumping of used or scrap tires on the Property.
12. On April 7, 2010, the ED filed a second amended petition and sent the amended petition to Respondents.
13. On October 20, 2010, the ALJ convened a hearing on the merits at SOAH's Austin location, and on December 10, 2010, the administrative record closed.
14. Attorney Darwin McKee entered a general appearance for all Respondents, and James Sallans and Jennifer Cook represented the ED.
15. Respondents who are heirs of G.W. Carter and who have an ownership interest in the Property are: Diane Hill, Donald A. Hill, Deborah Hill-Thompson, Lawrence A. Hill, Candis A. Hill McKelvy, Kermit A. Hill, Dorris Jean Hill, Aurelia Harris,

Grady Goodley, Delmaris Roby, Lawada Hill, Kevin Hill, Nokomis Hill, Cora Turner Houston, Coline Knox, James W. Carter, Lee Otis Carter, Joe I. Roland, Gettrell A. Carter, Gerald E. Carter, Merilee Crawford, Gaynell Carter-Jenkins, and Joe Carter.

16. Respondents who paid taxes on the Property were Diane Hill and James Carter.
17. Respondents who signed oil and gas leases on the Property were Joe Carter, Gettrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill.
18. The TCEQ adopted in 2002 a Penalty Policy about the computation and assessment of administrative penalties.
19. Chance Goodin, a TCEQ employee that conducted the investigation, established by photographic evidence and by testimony that approximately 76,666 tires had been dumped on the Property.
20. Clinton Sims, a TCEQ employee, established that an administrative penalty of \$23,250 was appropriate based on Mr. Goodin's estimate of the number of tires, the cost of removal, and the other factors listed in the Penalty Policy.
21. By paying taxes on the Property, Diane Hill and James Carter showed that they were aware of the existence of the Property and gained an economic benefit of ownership without tax liens.
22. By signing oil and gas leases on the Property, Respondents Joe Carter, Gettrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill

showed that they were aware of the existence of the Property and gained an economic benefit from the Property.

23. By examining the Property on a regular basis, Respondents Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill could have identified the violation and potentially could have taken steps to avoid further violations.

II. CONCLUSIONS OF LAW

1. The TCEQ has the authority to regulate the storage of used or scrap tires. TEX. HEALTH & SAFETY CODE § 361.112.
2. The TCEQ has authority over a person who violates any statute or rule within the TCEQ's jurisdiction. TEX. WATER CODE § 7.073.
3. The TCEQ may assess against a violator an administrative penalty and may order the person to take corrective action. TEX. WATER CODE §§ 7.051 and 7.073.
4. The maximum administrative penalty that the TCEQ may impose for violations of the law is \$10,000 per day. TEX. WATER CODE § 7.052(c).
5. In determining the amount of the penalty, the TCEQ must take into consideration with respect to an alleged violator: (1) the history and extent of previous violations; (2) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided; (3) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons; (4) economic

benefit gained through the violation; (5) the amount necessary to deter future violations; and (6) any other matters that justice may require. TEX. WATER CODE § 7.053.

6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law. TEX. GOV'T CODE ch. 2003
7. SOAH has the authority to recommend that the TCEQ make a final administrative determination of Respondents' ownership of the Property because of SOAH's: (1) general statutory authority to issue proposals for decision that include findings of fact and conclusions of law, TEX. GOV'T CODE § 2003.042(a)(6); and (2) SOAH's specific authority to hear any matter over which the TCEQ has jurisdiction. TEX. WATER CODE § 5.311(a); 30 TAC § 80.6.
8. A person may not store more than 500 used or scrap tires for any period on any privately owned property unless the person registers the storage site with the TCEQ. TEX. HEALTH & SAFETY CODE § 361.112(a) and 30 TAC § 328.60(a).
9. "Solid waste facility" means "... all contiguous land ... used for ... storing ... solid waste." TEX. HEALTH & SAFETY CODE § 361.003(36).
10. "Storage" means "... the temporary holding of solid waste, after which the solid waste is processed, disposed of, or stored elsewhere." TEX. HEALTH & SAFETY CODE § 361.003(38).
11. "Disposal" of solid waste includes the dumping or placing of solid waste "... on land ... so that the solid waste ... may be ... introduced into the environment" TEX. HEALTH & SAFETY CODE § 361.003(7).

12. A person may not “ . . . cause, suffer, allow, or permit the . . . storage . . . or disposal of municipal solid waste . . . or the use or operation of a solid waste facility to store . . . or dispose of solid waste . . . in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the [TCEQ], or in such a manner that causes: . . . (2) the creation and maintenance of a nuisance; or (3) the endangerment of the human health and welfare or the environment.” 30 TAC § 330.15(a).
13. A person may “ . . . not cause, suffer, allow, or permit the dumping or disposal of [municipal solid waste, including used and scrap tires] without the written authorization of the [TCEQ]. 30 TAC § 330.15(c).
14. The ED held the burden of proving that Respondents are the current heirs of the G.W. Carter estate and are proper parties to this proceeding. 30 TAC § 80.17.
15. The ED properly brought this administrative action against the heirs of G.W. Carter because: (1) an estate of a decedent is not a legal entity and may not properly sue or be sued as such and (2) claims against an estate should be instituted against the decedent’s personal representative or, under appropriate circumstances, against the heirs or beneficiaries. *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975).
16. The TCEQ procedural rules under which this proceeding was conducted do not include the concept of an “indispensable party,” notice to unknown heirs, or publication of notice to unknown heirs. 30 TAC ch. 80.
17. The proper parties to this proceeding are the individual heirs of G.W. Carter, many of whom were named as Respondents in this proceeding.

18. In the absence of a valid will, the Texas laws of descent and distribution apply to the ownership of a decedent's real property. *Jones v. LaFargue*, 758 S.W.2d 320, 325 (Tex. App.—Houston 1988, pet. denied).
19. G.W. Carter's estate passed by intestate succession to his children and their descendants. TEX. PROB. CODE § 38(a).
20. The estate of a deceased defendant is not a legal entity and cannot be sued. *Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex. 1987).
21. The heirs of an intestate estate are the proper parties to an enforcement action. *Miller v. Estate of Self*, 113 S.W.3d 554, 556 (Tex. App.—Texarkana 2003, no pet.).
22. The doctrine of primary jurisdiction allocates power between the state's courts and administrative agencies when both have authority to make initial determinations in a dispute. *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002).
23. No jurisdictional impediment to the authority of the TCEQ or SOAH to consider this case exists because no party has invoked the jurisdiction of a court that preempts their jurisdiction.
24. Based on the above Findings of Fact and Conclusions of Law, Respondents violated the TEX. HEALTH & SAFETY CODE § 361.112(a) and 30 TAC § 330.15(a) by failing to: (1) register a scrap tire storage site, and (2) prevent the unauthorized disposal of municipal solid waste.
25. The law governing administrative penalties requires the TCEQ to take into account: (1) the nature circumstances, extent duration, and gravity of the prohibited act with special emphasis on the impairment of existing water rights or the hazard or potential hazard

created to the health and safety of the public; (2) the impact of the violation on: (A) air quality in the region; (B) a receiving stream or underground water reservoir; (C) in stream uses, water quality aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or (D) affected persons; (3) with respect to the alleged violator: (A) the history and extent of previous violations; (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided; (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons; (D) economic benefit gained through the violation; (E) the amount necessary to deter future violations; and (4) any other matters that justice may require. TEX. WATER CODE § 7.053.

26. Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, Nokomis Hill, Donald A. Hill, Deborah Hill-Thompson, Lawrence A. Hill, Candis A. Hill McKelvy, Kermit A. Hill, Dorris Jean Hill, Aurelia Harris, Delmaris Roby, Lawada Hill, Kevin Hill, Cora Turner Houston, Joe I. Roland, Merilee Crawford, Gaynell Carter-Jenkins are the Respondents in this action.
27. The TCEQ should order: (1) all Respondents to remove the tires or bring their property into compliance as a tire storage facility and (2) to pay an administrative penalty of \$23,250.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Beginning 30 days after the effective date of this Commission Order, Respondents shall pay an administrative penalty in the amount of \$23,250 at the rate of \$100 each, each month consecutively until the administrative penalty is paid. The payment of this administrative penalty and the performance of all corrective action listed herein will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made payable to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: [Name of Respondent]; SOAH Docket No. 582-09-2078, TCEQ Enforcement No. 2006-1140-MSW-E to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 180 days of the effective date of this Order, unless extended, Respondents shall remove and dispose of all scrap tires on the Property at an authorized facility.
3. Within 180 days after the effective date of the Commission Order, Respondents shall submit written certification and detailed supporting documentation, including photographs, receipts, and other records, to demonstrate compliance with Ordering Provision No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

4. Respondents shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

With a copy to:

Barry Kalda, Waste Section Manager
Austin Regional Office
Texas Commission on Environmental Quality
1977 Industrial Boulevard
Abilene, Texas 79602-7833

5. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondents if the ED determines that Respondents have not complied with one or more of the terms or conditions in this Commission Order.
6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE § 2001.144.
8. The Commission's Chief Clerk shall forward a copy of this Order to each of the Respondents through their attorney.

9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman
For the Commission